86-653

NO:

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1986

RALPH R. RENNA,

Petitioner and Appellant,

vs.

CITY COUNCIL OF THE CITY OF SARATOGA, CITY OF SARATOGA PLANNING COMMISSION,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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RALPH R. RENNA,

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CITY COUNCIL OF THE CITY OF SARATOGA, CITY OF SARATOGA PLANNING COMMISSION,

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents, City Council of the City of Saratoga and City of Saratoga

Planning Commission, oppose the Petition for Writ of Certiorari filed herein on the grounds that the decision for which review is sought does not raise questions of federal law that must be settled by this court.

STATEMENT OF THE CASE

1. FACTS

Petitioner, RALPH R. RENNA (hereinafter "RENNA"), is the owner of a single-family residence structure located at 15041 Sobey Road, Saratoga, California (hereinafter "RESIDENCE") (Clerk's Transcript on Appeal (hereinafter "C.T.") 6:8-12; 268:33-34). The RESIDENCE is located on a lot in a R-1-40,000 Zoning District on a level building area (C.T. 48; 58), and the topography, vegetation, use and size of the lot is similar to other properties in the Zoning District

and that immediate area (C.T. 51; 57; 61; 67; 269:22-26).

In October, 1981, RENNA received design review approval from the City of Saratoga (hereinafter "CITY") for a 5,630 square foot single-story residence and a 980 square foot single-story accessory structure (C.T. 48-49; 58-59; 268:35-269:3). In approximately July, 1983, RENNA proceeded to construct a second-story addition to the previously approved single-story residence and single story accessory structure, said additions including balconies on the north and south walls of the residence (C.T. 18:20-23; 269:8-12). The balconies were constructed solely for aesthetic reasons (C.T. 44, 112). The second-story additions (including the balconies) were constructed by RENNA without first obtaining the required design review approval and building permits for such

additions from the CITY (C.T. 49; 59; 269:13-16). The unapproved and illegal second-story additions increased the total floor area for the residence and accessory structures by approximately 31% from 6,604 square feet to 8,652 square feet (C.T. 48-49; 58-59; 269:8-12). The CITY'S Zoning Ordinance establishes a standard of 6,200 square feet as the total square footage for a residence and accessory structures which may be constructed on a lot within the R-1-40,000 zoning district (C.T. 49; 59).

The side yard setback requirement for RENNA'S R-1-40,000 zoned lot is 20 feet (C.T. 48; 58). The balconies constructed by RENNA without the required design review approval and building permits encroach into the required side yard setbacks, three (3) feet for the north side balcony and four (4) feet for the south side balcony (C.T. 48-49; 58-

59; 269:17-19). The encroachment of both of the balconies into the side yard setbacks require variance approval (C.T. 49; 59).

Upon discovery of the illegal modifications to his residence and accessory structures, the CITY informed RENNA that design review approval thereof was required. The CITY first became aware that the balconies violated the setbacks when drawings showing the second-story addition were submitted to the CITY by RENNA in 1983 in connection with his application for design review approval for the remainder of the illegal modifications (C.T. 41; 49; 59; 148-159). RENNA was advised by the CITY at that time that a variance would also be required to legitimize the balconies as they currently existed (C.T. 41). An application for a variance for the balconies to encroach into the side yard

setbacks was submitted by RENNA to the CITY, and noticed public hearings on both the design review and variance applications were held by the Saratoga Planning Commission (hereinafter "Planning Commission"), on January 11, 1984, and January 17, 1984, to consider said applications (C.T. 69-94).

On January 17, 1984, after reviewing the evidence and taking public testimony, the Planning Commission voted 4-0 to deny RENNA's balcony variance application as per the recommendations contained in the Staff Report dated December 29, 1983 (C.T. 70; 91; 96). That Staff Report set forth the findings that had to be made pursuant to Saratoga Zoning Ordinance Section 17.6(a) in order to grant a variance, and evaluated the facts of Renna's application as it applied to each of those mandatory findings (C.T. 61). The Planning Commission concluded that it

could not make all of the findings required by the Zoning Ordinance for the granting of the requested variance (C.T. 96). However, the Planning Commission did grant design review approval of the second story additions made by RENNA to his residence and accessory structure (C.T. 98).

RENNA appealed the Planning Commission variance denial to the Saratoga City Council (hereinafter "City Council") (C.T. 101). On March 7, 1984, that appeal was heard by the City Council at a de novo public hearing (C.T. 107; 109-124). After reviewing the evidence and taking public testimony, the City Council voted 5-0 to (1) deny the appeal and affirm the decision of the Planning Commission, and (2) resolve that it was unable to make the findings required by Saratoga Zoning Ordinance Section 17.6(a) for the granting of the variance and

concurred with the evaluation of the facts pertaining to said balconies as set forth in the Staff Report to the Planning Commission dated December 29, 1983 (C.T. 107; 123).

ARGUMENT

I.

THERE IS NO QUESTION OF LAW FOR THE UNITED STATES SUPREME COURT TO SETTLE IN THIS CASE REGARDING THE RESPONDENT'S ALLEGED ARBITRARY AND CAPRICIOUS DENIAL OF PETITIONER'S VARIANCE APPLICATION, NOR REGARDING THE PETITIONER'S ALLEGED DENIAL OF EQUAL PROTECTION AND DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

Petitioner requests this court's review of a state court judgment affirming the Respondents' decision to deny Petitioner's application for a zoning variance. Petitioner contends that the Respondents' denial was arbitrary and capricious because the City had previously granted other variances to other persons on other properties regarding other projects. Petitioner

also contends that the Respondents' denial of his variance application denied him equal protection and due process under the Fourteenth Amendment. However, Petitioner fails to recognize that this case was decided and affirmed in the state courts based upon established legal principles regarding judicial review of administrative decisions, due process, and equal protection, is supported by established federal legal principles, and does not raise any federal questions of law which require settlement by the United States Supreme Court. Therefore, it is respectfully submitted that this court need not exercise its discretion to grant writ of certiorari review of this issue.

The Petitioner contends that the Respondents' decision to deny his variance application was arbitrary and capricious because the Respondents did

not uniformly apply the City's standards for deciding variance applications. Petitioner alleges that the Respondents have granted other variances to other persons on other property for other purposes, including a variance for a balcony on another property (the Nederveld property) in December 1983, whereas the Respondents denied the variance for the balconies on the Petitioner's property in January and March of 1984. However, the administrative record, and the law, do not support those contentions.

The law is clear that each variance, by its very nature, is unique. Zakessian v. City of Sausalito (1972) 28 Cal. App. 3rd 794, 799-800. In passing on an application for a variance, action taken on other applications, or the existence of non-conforming uses in the vicinity, is not conclusive. 101A C.J.S., Zoning,

section 246, p. 270. Prior variances granted by a zoning adjustment board are not in themselves controlling as to subsequent variance applications for different properties. Minney v. City of Azusa (1958) 164 Cal. App. 2d 12, 32, appeal dismissed 359 U.S. 436. Otherwise, the granting of one variance from a particular zoning regulation would be asserted as a justification for all future requests for variances from the same zoning regulation, and thus, the general regulation eventually would be nullified, and the anullment of any zoning regulation is a legislative function that is beyond the domain of a zoning appeals board. Id.. In making its decision regarding the Petitioner's application, the Respondents reviewed both documentary evidence and oral testimony received at the public hearings regarding the application (C.T. 69-94;

107; 109-124). Based on that evidence, the Respondents determined that the Petitioner's application did not satisfy the five mandatory elements set forth in Saratoga Zoning Ordinance section 17.6(a) for the granting of a variance (C.T. 96; 107; 123).

The California courts, in reviewing the City Council's decision under a petition for writ of mandate filed pursuant to California Code of Civil Procedure Section 1094.5, were required to uphold the decision if they found that the decision was supported by findings, and the findings were supported by substantial evidence in light of the administrative record before the City Council when it made its decision. Siller v. Board of Supervisors (1962) 58 Cal. 2d 749. The reviewing state courts applied that standard and affirmed the City Council's decision. The fact that

other variances may have been granted by the Respondents to other persons for different purposes on different parcels of land is not the deciding factor. Based upon the evidence before it at its hearings, the Respondents decided that the Petitioner's application did not meet the mandatory requirements of Saratoga Zoning Ordinance section 17.6(a) for the granting of the requested variance, and on that basis, denied the application.

Under federal law, allegations of arbitrary and capricious zoning decisions are reviewed as part of substantive due process under the Fourteenth Amendement, and the substantive due process requirement is met if there is any conceivable rational basis for the zoning decision. Vance v. Bradley, 440 U.S. 93 (1978); Shelton v. City of College Station, 780 F.2d 475, 477 (5th Cir. 1986). A particular decision or action

is arbitrary if it is reached without an adequate determining principle or was unreasoned. Scudder v. Town of Greendale, 704 F.2d 999 (7th Cir. 1983). The key inquiry is whether the question is at least debatable. If it is, there is no denial of substantive due process as a matter of federal constitutional law. Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 464 (1981).

The facts of Petitioner's application, as determined after public hearings and contained in the administrative record, did not satisfy the requisite elements necessary for the granting of a variance (C.T. 61). Therefore, the Respondents' decision to deny Petitioner's variance application was made on a rational basis and cannot be deemed arbitrary or capricious.

Petitioner's contention that the Respondents' denial of his application

for a zoning variance was discriminatory and denied him equal protection is also without merit. The fact that a City may have granted variances to some property owners and denied variances to other property owners in the immediate neighborhood or same zoning district does not establish unreasonable discrimination. City of San Marino v. Roman Catholic Archbishop of Los Angeles (1960) 180 Cal. App. 2d 657, cert. denied 364 U.S. 909. A claim of discriminatory enforcement of zoning regulations must involve an element of intentional or purposeful discrimination. Tarkowski v. Robert Bartlett Realty Company, 644 F.2d 1204, 1206 (7th Cir. 1980). A discriminatory purpose is not to be presumed, but rather there must be a showing of clear and intentional discrimination. Snowden v. Hughes, 321 U.S. 1, 8 (1944).

The record in the present case is devoid of any facts showing clear and intentional discrimination by the Respondents in denying Petitioner's variance application. Once again, the fact that other variances may have been granted to other persons for different projects on different properties is not the test. The City evaluates each variance application by the same criteria contained in Saratoga Zoning Ordinance section 17.6(a). The standard remains the same in each case. However, the facts of each case are unique.

Therefore, it is respectfully requested that this court refrain from exercising its discretion to grant the Petitioner's request for review by writ of certiorari because this case does not raise a question of law which must be settled by this court. To expand the availability of federal review to every

zoning decision would only serve to further congest an already overburdened federal court system. Scudder, supra, at 1003.

II.

THE CITY MADE SUFFICIENT FINDINGS IN SUPPORT OF ITS DECISION TO DENY PETITIONER'S VARIANCE APPLICATION AND THUS THIS COURT NEED NOT REVIEW THIS ISSUE.

The Petitioner contends that the Respondents made no findings regarding their decision to deny the Petitioner's variance application and, therefore, the Petitioner's due process rights have been violated. Petitioner's contention is factually wrong and does not raise a federal issue worthy of United States Supreme Court review.

The administrative record in this case states the findings on which the Respondents based their decision, namely, the failure of Petitoner's application to

satisfy the statutory requirements for the granting of a varaince (C.T. 107; 122-123). Those findings incorporate by reference the Planning Department Staff Report (C.T. 61). Findings for administrative decisions may incorporate by reference such reports. McMillan v. American General Finance Corp. (1976) 60 Cal. App. 3d 175.

This court has previously expressed its displeasure with the idea of federal due process claims being the basis for federal court adjudication when adequate remedies are provided by a state forum. Paul v. Davis, 424 U.S. 693 (1976); Bishop v. Wood, 426 U.S. 341 (1976); Ingraham v. Wright, 430 U.S. 651 (1977).

California law guarantees a judicial review (based upon the substantial evidence standard of review) of any zoning regulation enforcement decision. California Code of Civil Procedure

Section 1094.5; Siller, supra. The standard of review established by California Code of Civil Procedure Section 1094.5 requires that an administrative adjudicative decision must be supported by findings, and the findings must be supported by the evidence. Plaintiff has availed himself of that form of judicial review, and the Respondents' decision denying the variance application has been considered and affirmed by the trial court (both after the original hearing and after a motion for reconsideration), the State Court of Appeal (both after the original appeal and after a petition for rehearing), and the California Supreme Court. Therefore, Petitioner's contention of no findings is tantamount to saying that the Respondents' decision is unsupported by substantial evidence. Where judicial review in state courts is

guaranteed by statute and where the substantial evidence standard of review is required, it would be inappropriate to proclaim a federal due process violation on grounds which are simply tantamount to saying that the particular decision is unsupported by substantial evidence. Moore v. Ross (D.C.N.Y. 1980) 502 F. Supp 543, affirmed 687 F.2d 604, cert. denied 459 U.S. 1115.

Inasmuch as the Petitioner has availed himself of an adequate remedy provided by California Code of Civil Procedure Section 1094.5 for ascertaining the sufficiency of the Respondents' findings, this federal claim disputing the adequacy of the findings does not warrant review by this court.

III.

PETITIONER'S ATTEMPT TO RAISE SPECULATIVE ALLEGATIONS OF PROCEDURAL DUE PROCESS VIOLATIONS FOR THE FIRST TIME IN THIS APPEAL DOES NOT WARRANT THIS COURT'S REVIEW BY WRIT OF CERTIORARI.

Petitioner contends that this court must review this case in order to determine that he was denied a fair hearing before the City Council in violation of his due process rights. The contentions alleged for this proposition are that the public hearing was held at a late hour, and that various council members were absent at the time the decision was made. Once again, Petitioner's factual allegations are not correct and these claims do not raise federal questions warranting review by this court.

All claims alleging violations of procedural due process must be raised at the adminsitrative hearing or they are barred. Valley Wood Preserving, Inc. v. Paul, 785 F.2d 751 (9th Cir. 1986). The Petitioner, who was represented by his attorney at the City Council public hearing, did not object at the public

hearing as to the hour of that hearing. If he felt that it was too late, he could have objected at that time and requested that the hearing be continued to a meeting at a future date and time. Petitioner did not object, nor did he request a continuance. Since Petitioner raised no procedural due process objection at the time of his hearing, and chose to proceed with his hearing, he is now barred from bringing any claims regarding alleged procedural due process violations.

Moreover, Petitioner's allegations regarding missing and inattentive councilmembers are inaccurate. The administrative record shows that all five councilmembers were present during the public hearing and voted on the Petitioner's appeal (C.T. 107, 109-124). Although Petitioner contends that the attention of the councilmembers present

at the hearing diminished, this claim is purely speculative "mind reading". Once again, if the Petitioner, who was represented by his attorney at the hearing, had a question regarding the attentiveness of the councilmembers hearing his appeal, he could have requested that the hearing be continued to a meeting at a future date and time. Petitioner's failure to so object at the time of his hearing now bars him from raising this speculative claim at this time.

The administrative record shows that the Petitioner was given an opportunity to be heard, and he availed himself of that opportunity without objection at the time his matter was called. The matter was heard as an ordinary administrative proceeding involving a de novo hearing regarding a variance request. An ordinary administrative proceeding

involving land use or zoning does not present serious due process or equal protection issues, no matter how disappointed the license or privilege seeker may feel at initially being turned down; Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (1st Cir. 1981), cert. denied 459 U.S. 989 (1982).

Petitioner's attempt to raise speculative allegations to the level of substantial procedural due process claims for the first time on appeal does not warrant this court's review by writ of certiorari.

CONCLUSION

For all of the aforementioned reasons, it is respectfully requested that this court deny the Writ of Certiorari review sought by Petitioner.

Dated: November 7, 1986

Respectfully submitted,

ATKINSON-FARASYN

BY: _____
Leonard J. Siegal

PROOF OF SERVICE AND DECLARATION OF MAILING

1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA)
) SS.
COUNTY OF SANTA CLARA)

I am a citizen of the United States and a resident of the county aforesaid and am a member of the Bar of this Court; I am over the age of eighteen years and not a party to the within-entitled action; my business address is 660 West Dana Street, Mountain View, California 94042.

On November 7, 1986, I served the within PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope by Express Mail, overnight delivery, postage thereon fully prepaid, in the United States mail at Mountain View, California, addressed as follows:

The Clerk of the Supreme Court of the United States
1 First Street Northeast
Washington D.C. 20543

By First Class Mail addressed as follows:

Randy M. Hess, Esq.
Duane W. Shewaga, Esq.
Robin L. Pearl, Esq.
Adleson, Hess, Christensen & Kelly
110 North Third Street
San Jose, CA 95112

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 7, 1986, at Mountain View, California.

Steven G. Baird

STEVEN G. BAIRD

State of California
County of Santa Clara

On November 7, 1986, before me the undersigned, a Notary Public for the State of California, personally appeared Steven G. Baird, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument, and acknowledged that he executed it.

Nancy L. Sugimoto

NANCY L. SUGIMOTO